



**In the Matter of:**

**DERRICK JOHNSON,**

**ARB CASE NOS. 13-014  
13-046**

**COMPLAINANT,**

**ALJ CASE NO. 2010-SOX-037**

**v.**

**DATE: July 22, 2013**

**U.S. BANCORP/U.S. BANKNATIONAL  
ASSOCIATION,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Chellie M. Hammack, Esq.; C.M. Hammack Law Firm, Seattle, Washington**

*For the Respondents:*

**Janie F. Schulman, Esq.; James Oliva, Esq.; and Stephanie L. Fong, Esq.; Morrison & Foerster LLP, Los Angeles, California**

*For the Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae:*

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E. Guenther, Esq.; and Ann Capps Webb, Esq.; United States Department of Labor, Washington, District of Columbia**

**BEFORE: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge.**

**FINAL DECISION AND ORDER APPROVING SETTLEMENT  
AND DISMISSING COMPLAINT WITH PREJUDICE**

This case arose when the Complainant, Derrick Johnson, filed a complaint under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud

Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX or Act), and its implementing regulations.<sup>1</sup> On October 29, 2012, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) holding that Johnson's employer, Respondent U.S. Bancorp/U.S. Bank National Association (U.S. Bank), violated the SOX when it suspended and then terminated his employment because Johnson engaged in whistleblower protected activity. On March 7, 2013, the ALJ issued a Decision and Order on Complainant's Application for Attorney Fees and Costs (D. & O. Fees), awarding Johnson's counsel \$581,756.61 in attorney's fees and costs.

U.S. Bank timely appealed both the ALJ's decision on the merits (ARB No. 13-014)<sup>2</sup> and the ALJ's subsequent decision awarding attorney's fees and costs (ARB No. 13-046) to the Administrative Review Board (ARB or Board). The Secretary of Labor has delegated her authority to issue final administrative decisions in SOX cases to the ARB.<sup>3</sup>

While the appeals were pending before the Board, the parties filed a Joint Motion for Approval of Settlement and to Dismiss All Claims with Prejudice on July 9, 2013, informing the Board that the parties reached a settlement of their case. The parties have jointly requested that the Board approve the settlement agreement and dismiss the complaint.

The applicable SOX implementing regulations specifically provide that "[a]t any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the . . . ARB if the ARB has accepted the case for review."<sup>4</sup> "A copy of the settlement" must be filed

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<sup>1</sup> 18 U.S.C.A. § 1514A (Thomson/West Supp. 2012). The regulations implementing the SOX are found at 29 C.F.R. Part 1980 (2012). Congress has amended the Act (18 U.S.C.A § 1514A) since Johnson filed his complaint in 2007. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010)(Dodd-Frank Act); 76 Fed. Reg. 68084-97 (Nov. 3, 2011). The Department of Labor amended the SOX's implementing regulations (29 C.F.R. Part 1980) in response to the Dodd-Frank Act. *See* 76 Fed. Reg. 68084 (Nov. 3, 2011). These minor revisions to the settlement regulations "do not reflect substantive changes in the requirements for submission and Departmental approval of settlement agreements." *Id.* at 68090.

<sup>2</sup> The ALJ's order of relief on the merits included, among other awards, an order that Johnson be immediately reinstated to his former employment with the same seniority that he would have had but for the Respondent's violation of SOX. D. & O. at 21-22. On appeal, U.S. Bank filed a motion for a stay of the ALJ's order requiring the Respondent to reinstate Johnson to his former position of employment while its appeal was pending, which the Board denied. *Johnson v. U.S. Bancorp*, ARB No. 13-014, ALJ No. 2010-SOX-037 (ARB May 21, 2013).

<sup>3</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1980.110(a).

<sup>4</sup> 29 C.F.R. § 1980.111(d)(2). *See also* *Cunningham v. Livedeal, Inc.*, ARB No. 11-047, ALJ No. 2011-SOX-004, slip op. at 2 (ARB Aug. 5, 2011); *Anderson v. Schering Corp.*, ARB No. 10-070, ALJ No. 2010-SOX-007, slip op. at 2 (ARB Jan. 31, 2011); *Carciero v. Sodexho Alliance, S.A.*, ARB No. 09-067, ALJ No. 2008-SOX-012, slip op. at 2 (ARB Sept. 30, 2010).

with the ARB.<sup>5</sup> A settlement under the SOX cannot become effective until its terms have been reviewed and determined to be fair, adequate, reasonable, and in the public interest.<sup>6</sup> Because Johnson and U.S. Bank have jointly submitted the settlement as required and no party has indicated any opposition to its terms, we deem the terms of the settlement agreement unopposed and will review it in accordance with the applicable regulations.

Review of the agreement reveals that it includes the settlement of matters under laws in addition to the SOX.<sup>7</sup> But the Board's authority over settlement agreements is limited to claims brought under the statutes within the Board's jurisdiction and pending before the Board. Thus, our approval is limited to this case, and we approve the agreement only insofar as it pertains to Johnson's SOX claim in ARB Nos. 13-014 and 13-046 (ALJ No. 2010-SOX-037), the cases currently before the Board.<sup>8</sup>

Additionally, the Separation Agreement contains confidentiality and non-disparagement clauses.<sup>9</sup> The ARB notes that the parties' submissions, including the Separation Agreement, become part of the record of the case and are subject to the Freedom of Information Act (FOIA).<sup>10</sup> FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act.<sup>11</sup> Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.<sup>12</sup> Further, if the confidentiality and non-disparagement clauses were interpreted to preclude Johnson from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore constitute unacceptable "gag" provisions.<sup>13</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Carciero*, ARB No. 09-067, slip op. at 2.

<sup>7</sup> Settlement Agreement and General Release of All Claims (Settlement Agreement), ¶ 1(c), ¶ 2.

<sup>8</sup> *See Cunningham*, ARB No. 11-047, slip op. at 2.

<sup>9</sup> Settlement Agreement, ¶ 4(a), ¶ 7, ¶ 9.

<sup>10</sup> 5 U.S.C.A. § 552 (Thomson/West 1996 & Supp. 2012).

<sup>11</sup> *Anderson*, ARB No. 10-070, slip op. at 2; *Norton v. Uni.-Group, Inc.*, ARB No. 08-079, ALJ Nos. 2007-STA-035, -036; slip op. at 3 (ARB May 30, 2008) (citing *Coffman v. Alyeska Pipeline Serv. Co. & Artic Slope Inspection Serv.*, ARB No. 96-141, ALJ Nos. 1996-TSC-005, -006; slip op. at 2 (ARB June 24, 1996)).

<sup>12</sup> 29 C.F.R. § 70 *et seq.* (2012).

<sup>13</sup> *Anderson*, ARB No. 10-070, slip op. at 2; *Kingsbury v. Gordon Express, Inc.*, ARB No. 07-047, ALJ No. 2006-STA-024, slip op. at 2-3 (ARB Aug. 31, 2007).

Finally, the Separation Agreement provides that it shall be governed by and construed in conformance with the laws of the State of Washington.<sup>14</sup> We construe this choice of law provision as not limiting the authority of the Secretary of Labor and any federal court, which shall be governed in all respects by the laws and regulations of the United States.<sup>15</sup>

The parties have certified that the Settlement Agreement constitutes the entire settlement “in full satisfaction of all of” Johnson’s “demands” against U.S. Bank.<sup>16</sup> The Board finds that the settlement is fair, adequate, and reasonable, and does not contravene the public interest. Accordingly, we **APPROVE** the agreement and **DISMISS** the complaint with prejudice.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>14</sup> Settlement Agreement, ¶ 22(a).

<sup>15</sup> *Cunningham*, ARB No. 11-047, slip op. at 3; see *Keough v. Surmodics, Inc.*, ARB No. 09-041, ALJ No. 2008-SOX-065, slip op. at 2 (ARB Aug. 27, 2009).

<sup>16</sup> Settlement Agreement, ¶ 1(c).